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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASIA AWAD, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, RAAD KHALAF and DOES 1 – 30, inclusive, Defendants.	CASE NO.: 08 CV 0696 JM(AJB) SDSC Case No. 37-2008-00062594-CU-IC-EC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DROP RAAD KAHLAF AS A SHAM DEFENDANT PURSUANT TO F.R.C.P. RULE 21** **DATE: 5-23-08** **TIME: 1:30 PM** **COURTROOM: 16**

1. INTRODUCTION

Plaintiff Asia Awad ("AWAD") seeks to avoid this court's jurisdiction by improperly joining Raad Khalaf ("KHALAF") as a defendant in this matter. This motion seeks to drop defendant KHALAF as an improperly joined defendant. AWAD's claim against KHALAF for Negligence is untenable as a matter of law and contra to existing California authority. Acting in the capacity of Defendant, Liberty Mutual Insurance Company's ("LMFIC") agent, KHALAF cannot be held individually liable for the claims asserted in the Plaintiff's Complaint. As a sham defendant, KHALAF should be dismissed from this matter pursuant to Federal Rule of Civil Procedure 21.

2. STATEMENT OF FACTS

This action is based on AWAD's dispute with LMFIC concerning insurance policy benefits arising from a theft loss that occurred at the insured's property, located at 835 Murray Drive, El Cajon, California. On March 12, 2008, AWAD filed her Complaint in the San Diego Superior Court. (A true and correct copy of AWAD's Complaint is attached as Exhibit "A" to the Declaration Dale A. Amato.)

AWAD's Complaint names LMFIC and KHALAF as defendants. The claims against LMFIC are for Breach of Insurance Contract and Breach of the Covenant of Good Faith and Fair Dealing. The claim against defendant KHALAF is for Negligence.

According to the Complaint, KHALAF was an insurance agent for LMFIC and was the agent that AWAD used in the procurement of her insurance policy. (Complaint, ¶¶ 15-17, see, also, declarations page of LMFIC policy attached as Exhibit "A" to Complaint.) AWAD's allegations against KHALAF relate solely to KHALAF's activities as an LMFIC agent relative to the procurement of the policy of insurance. (Complaint, ¶¶ 15-21.) The Complaint admits that KHALAF procured the requested jewelry floater coverage in the amount of $159,300. (*See*, Complaint, Exhibit "A" and declarations page attached thereto.), but alleges that despite obtaining the coverage, KHALAF advised LMFIC that he did not believe that AWAD had the jewelry that was to be endorsed onto the policy. (Complaint, ¶¶ 15-21.) These allegations are fatal to the claim against KHALAF.

On April 16, 2008, LMFIC removed this action to federal court. LMFIC's Petition for Removal indicated that it would bring the instant motion.

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3. LEGAL ARGUMENT

A. Standards For Dismissing Improper Defendants.

Rule 21 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

Courts frequently employ Rule 21 to preserve diversity jurisdiction over a case by dropping a non-diverse party if the party's presence in the action is not required; that is, if the party is not an indispensable party under Rule 19. (*See, e.g.*, 7 C. Wright & A. Miller Federal Practice and Procedure § 1685 (3d ed. 2001); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1154-1155 (9th Cir. 1998) [dismissing non-diverse defendant where only diverse defendant would be at fault]; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523-1524 (9th Cir. 1987) [dismissal of settling defendant appropriate to preserve diversity jurisdiction]; see, *also*, *Gasnik v. State Farm Ins. Co.*, 825 F. Supp. 245, 247 (E.D. Cal. 1992) [insurance agent party fraudulently joined merely to prevent removal of action against insurer to federal court dropped pursuant to Rule 21.].) Indeed, it is an abuse of discretion to refuse a motion to drop a party under such circumstances. (*See*, *Anrig v. Ringsby United*, 603 F.2d 1319, 1324-1325 (9th Cir. 1978); *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1154 (11th Cir. 1985).)

A district court has jurisdiction to determine if defendants who would destroy diversity are fraudulently joined as sham defendants and may dismiss those defendants. (*McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) [where defendants raised fraudulent joinder issue, "court had to determine if they were fraudulently joined"].) A court may look beyond the complaint, and the defendant "is entitled to present to the federal court facts showing the joinder to be fraudulent." (*McCabe v. General Foods Corp.*, *supra*, 811 F.2d at 1339; see, *also Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).) A defendant may also submit facts showing that a resident defendant had "no real connection with the controversy." (*Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 [42 S. Ct. 35; 66 L. Ed. 144] (1921).)

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In *McCabe*, the plaintiff named his former employer -- a diverse defendant -- and two supervisors -- non-diverse defendants. The court dismissed the non-diverse defendants, finding that the plaintiff had failed to state a cause of action against them, because their actions were alleged to have been ratified by their employer and not taken on their own initiative. The court dismissed the parties as being fraudulently joined. (*McCabe v. General Foods Corp.*, *supra*, 811 F.2d at 1339.)

Likewise, in *Ritchey*, the plaintiff named three defendants -- two of whom would destroy diversity. The two non-diverse defendants were held to be sham defendants by the court, because they could rely upon the defenses of the statute of limitations and *res judicata*. (*Ritchey v. Upjohn Drug Co.*, *supra*, 139 F.3d at 1318.)

In *Wilson*, the plaintiff named two defendants, one non-diverse defendant "not in any degree whatsoever responsible" for the plaintiff's alleged injuries. The Court emphasized that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." (*Wilson v. Republic Iron & Steel Co.*, *supra*, 257 U.S. at 97.)

Further, so long as appropriate relief can be fashioned among the parties remaining in the lawsuit, it is appropriate to dismiss unnecessary defendants whose presence would destroy diversity. (*See*, e.*g*. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983) [government not necessary party to dispute between defense contractor and manufacturer because court could fashion relief between parties without presence of government as defendant.].)

As more fully set forth below, there are no legitimate claims against KHALAF.

B. California Law Does Not Impose Liability On An Insurer's Agent Or Employee Acting In The Course And Scope Of His Employment.

AWAD's claim against KHALAF for Negligence is inconsistent with existing California authority. California courts have long held that an insurer's employees and agents are not individually liable for alleged wrongful conduct while executing their employment obligations.

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Mercado v. Allstate Ins. Co., 340 F.3d 824 (9th Cir. 2003) is now the controlling authority on fraudulent joinder of insurance agents and employees. In *Mercado*, the plaintiff filed suit against Allstate and its insurance adjuster asserting claims for insurance bad faith and violation of Business and Professions Code section 17200. Although the insurance adjuster was a non-diverse defendant, Allstate removed the action to district court. In denying plaintiff's motion to remand, the district court determined that the insurance adjuster had been fraudulently joined to defeat diversity jurisdiction.

The Ninth Circuit determined that plaintiff's remand motion was properly denied. Specifically, the court determined that the plaintiff's claims against the insurance adjuster were wholly improper:

> All of Mercado's allegations against [the insurance adjuster] pertain to actions she took in her capacity as an Allstate employee. It is well established that, unless an agent or employee acts as a dual agent . . . she cannot be held individually liable as a defendant unless she acts for her own personal advantage. [Citation]. At all times during her dealings with Mercado, [the insurance adjuster] acted as Allstate's agent. Accordingly, [the insurance adjuster] is not individually liable. [Citations]. The district court did not err in concluding that [the insurance adjuster] was a fraudulently named defendant.

(*Mercado v. Allstate Ins. Co.*, *supra*, 340 F.3d at 826.)

The *Mercado* court cited the well-established rule set forth in *Lippert v. Bailey*, 241 Cal.App.2d 376 (1966) that acts of an insurance agent within the course and scope of his employment for the insurer are not actionable against the agent individually. To the extent the *Mercado* court set forth an exception to the *Lippert* non-liability rule, it limited it to circumstances where the employee acts as a "dual agent," which is characterized by the agent or the employee assuming special duties for the benefit of the insured person beyond those required by its principal. (*Mercado v. Allstate Insurance Company*, *supra*, 340 F.3d at 826.)

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Likewise, the court in *Charlin v. Allstate Insurance Company*, 19 F.Supp.2d. 1137, 1140-1141 (C.D. Cal. 1998), concluded that joinder of an agent was fraudulent because plaintiff failed to establish he was a “dual agent” by acting beyond the capacity of his employer.

KHALAF was acting for LMFIC in the course and scope of his employment. KHALAF is identified as an “agent” of LMFIC on the policy. (*See*, Complaint, Exhibit “A” at declarations page attached thereto.)

In *Good v. Prudential Insurance Company of America*, *supra*, 5 F.Supp.2d 804, the District Court for the Northern District of California upheld the removal of an action to federal court under these similar circumstances. In *Good*, the plaintiff brought and action against Prudential and its agent, Barbara Magid, alleging that Magid, while acting in the course and scope of her employment with Prudential, made representations about the benefits of a variable appreciable life insurance policy. Specifically, Magid represented that after a period of three to six years, the premiums would “vanish” but that Good would still have the protection. Mr. Good’s suit alleged that Prudential never intended to allow the premiums to vanish that that those misrepresentations were part of a nationwide practice followed by Prudential. (*Good v. Prudential Insurance Company of America*, *supra*, 5 F.Supp.2d at 805.)

Prudential removed the case to federal court and Good moved to remand the case back to state court. Good’s theory that Magid was properly joined as a defendant because it was alleged that she acted as duel agent due to the fact that Magid had superior knowledge of the insurance products, which lead him to believe the Magid was acting in his best interests. The court, citing to *Lippert* and *Gasnik v. State Farm Insurance Co.*, *supra*, 825 F.Supp. 245, held that there was no possibility that Good would be able to establish a claim against Magid. (*Good v. Prudential Insurance Company of America*, *supra*, 5 F.Supp.2d at 808.)

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Like *Mercado, Charlin*, and *Good*, all of KHALAF's alleged conduct pertain to actions taken in his capacity as LMFIC's agent. To the extent that *Mercado* applies any exception the *Lippert* rule of agent and employee non-liability, that exception is not present here.

Furthermore, even if a negligence claim against KHALAF is proper here, the allegations do not support such a cause of action. It is clear from the complaint that KHALAF did, in fact, procure the jewelry floater coverage. This is evidenced by the declarations page of the policy, attached as Exhibit "A" to the Complaint. The fact that LMFIC denied the claim, based in part on what KHALAF may or may not have said about the existence of the jewelry, is not negligence.

4. CONCLUSION

Based on the foregoing, KHALAF is an improper defendant named solely to defeat diversity jurisdiction in this action and should be dismissed.

DATED: April 18, 2008

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